85-416

Supreme Court, U.S.
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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPH SCAGLIONE,
PETITIONER,

v.

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1395 and
AT&T TECHNOLOGIES, INC.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

QUESTIONS PRESENTED

1. Should *Del Costello*, decided by this Court in 1983, establishing a six-month statute of limitations for actions by individuals against their unions and companies, be applied retroactively to bar a suit brought in 1977, when the appropriate statute of limitations was six years against companies and three years against unions?

2. Should the statute of limitations begin to run when the union has not informed its member that it has concluded its processing of the grievance?

3. Does a union owe a fiduciary obligation to its members which requires it to notify its members in writing that it has concluded the processing of a grievance, and of a right to bring suit for breach of the duty of fair representation?

4. Whether the statute of limitations in a suit by an individual against the union should begin to run where the union is still pursuing the grievance.

5. When should the statute of limitations begin to run against a union for breach of the duty of fair representation?

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JOSEPH SCAGLIONE,
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COMMUNICATIONS WORKERS OF AMERICA,
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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Joseph Scaglione, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in the above entitled case.

Opinions Below

The opinion issued by the Court of Appeals is unreported, and is reproduced in Appendix A of this petition. The memorandum of decision of the United States District Court is unreported, and is reproduced in Appendix B. The first decision of the Court of Appeals is unreported, and is reproduced

in Appendix C. The memorandum and decision of the United States District Court is unreported, and is reproduced in Appendix D.

Jurisdiction

The Court of Appeals issued its opinion affirming the decision of the United States District Court on April 17, 1985. A petition for re-hearing was duly filed, and the petition for rehearing was denied on June 10, 1985.

This court has jurisdiction pursuant to 28 U.S.C., section 1254(1).

Statutes Involved

This case involves the interpretation and application of 29 U.S.C., section 185 and 29 U.S.C., section 160(b). The texts of those statutes are set forth respectively in Appendix E, *infra* and Appendix F, *infra*.

Statement of the Case

Joseph Scaglione ("SCAGLIONE") was hired by Western Electric Company ("COMPANY") as an assembly line person on or about June 8, 1970. SCAGLIONE subsequently became a member of Communications Workers of America, Local 1395 ("LOCAL 1395") in accordance with the provisions of a collective bargaining agreement between LOCAL 1395 and the COMPANY.

Prior to July 30, 1975, SCAGLIONE had only one minor problem with the COMPANY concerning his attendance, and this was a result of a serious medical condition which was satisfactorily resolved.

In March 1975, Leroy Gilbert ("GILBERT") became SCAGLIONE's immediate supervisor. On or about July 30, 1975 GILBERT issued a verbal warning to SCAGLIONE for not working fast enough; about 1½ hours later on the same day

GILBERT issued a written warning alleging unsatisfactory job performance and application; on the same day, GILBERT issued a 2½ day suspension to SCAGLIONE, alleging as grounds, unsatisfactory job performance and application. Prior to this time, SCAGLIONE had never been warned by any person or supervisor of the COMPANY concerning his job performance or application.

On or about August 14, 1975, GILBERT gave SCAGLIONE a one-day suspension for allegedly leaving through an unauthorized exit on August 12, 1975.

SCAGLIONE was absent from work for two weeks because of a recurring back injury. He returned to work on October 14, 1975 for light duty, but was assigned by GILBERT to a job that was more difficult than his regular job. SCAGLIONE requested that he be placed back on his regular job which GILBERT finally agreed to do on October 30, 1975.

On October 30, 1975 the work to be done arrived late and was much heavier than usual. GILBERT gave additional help to all of the other sections except SCAGLIONE's section, even though GILBERT knew that SCAGLIONE's section needed more help than the other sections because of SCAGLIONE's back condition. Because of the increased work load and the pressure placed upon SCAGLIONE, he became ill and left work early.

On October 31, 1975 LOCAL 1395 handed SCAGLIONE a termination notice. GILBERT was responsible for causing the termination of at least three persons, SCAGLIONE, Linda F. Ferrante ("FERRANTE"), and Peter F. Morello ("MORELLO"), all persons of Italian ancestry and national origin.

From July 30, 1975 until the suit was instituted in December 1977, SCAGLIONE requested that LOCAL 1395 pursue his grievances concerning all of the disciplinary actions taken against him, including his wrongful termination. On August 16, 1975 SCAGLIONE wrote to the national union for help because LOCAL 1395 was totally ignoring his grievances. As a

result, SCAGLIONE was severely reprimanded by representatives of LOCAL 1395. Although SCAGLIONE attempted to have LOCAL 1395 pursue all of his grievances, the only grievance LOCAL 1395 pursued was the one concerning SCAGLIONE's wrongful discharge, and even that grievance was handled in a perfunctory manner. Although SCAGLIONE attempted to communicate with Francis J. Burns ("BURNS") president of LOCAL 1395, he was only able to personally meet with BURNS once in January 1976. At that time, SCAGLIONE was told by BURNS to prepare a statement of his grievances, which SCAGLIONE did. Each time a meeting was set up to discuss SCAGLIONE's grievances, BURNS failed to appear. SCAGLIONE also attempted to communicate with BURNS on numerous occasions by telephone, both at BURNS' home and at the union hall. SCAGLIONE was able to contact BURNS by telephone only once in May 1977, and when SCAGLIONE inquired as to the status of his grievances, BURNS replied, "I will start to work on your case in seven to ten years."

SCAGLIONE has categorically denied that the disciplinary action meted out by GILBERT was justified. SCAGLIONE contends that the actions taken against him by GILBERT were arbitrary, capricious, unlawful and violated the collective bargaining agreement between the COMPANY and LOCAL 1395.

The action was originally brought by SCAGLIONE in state court on December 29, 1977 against LOCAL 1395 for breach of the duty of fair representation, for handling SCAGLIONE's grievances in a perfunctory and arbitrary manner and in failing to properly represent SCAGLIONE in his grievances with his former employer, the COMPANY. On April 2, 1979 a Motion to amend the original Complaint was allowed adding the COMPANY as a party defendant for breach of the collective bargaining agreement. The case was subsequently removed to

the United States District Court for the District of Massachusetts on or about May 30, 1979, because a federal statute was involved, namely 29 U.S.C., section 185.

From September 10, 1979 to January 8, 1981, there was extensive pre-trial discovery. By order of the court, pre-trial memoranda were required to be filed by the parties, and they were filed in due course.

Both LOCAL 1395 and the COMPANY moved for Summary Judgment seeking to have the Complaint dismissed against them. On August 7, 1981, the District Court granted their Motions for Summary Judgment and entered judgment on August 7, 1981 (Appendix D). On or about June 22, 1982, the judgment of the District Court was vacated and the case was remanded to the District Court for further proceedings consistent with the opinion of the Court of Appeals (Appendix C).

The District Court then applied the six-month statute of limitations set forth in 29 U.S.C., section 160(b) retroactively in light of *Del Costello* v. *International Brotherhood of Teamsters*, ____U.S.____, 103 S.Ct. 2281 (1983), and dismissed the suit against the COMPANY shortly thereafter, and dismissed the suit against LOCAL 1395 after holding an evidentiary hearing to determine when SCAGLIONE knew or should have known that his cause of action accrued. At that hearing the District Court found that LOCAL 1395 did little or nothing for SCAGLIONE. The District Court decided that SCAGLIONE's cause of action accrued on or about May 16, 1977, and that he had six months from that time within which to file a suit against both the COMPANY and LOCAL 1395, even though at that time, the law in the United States Court of Appeals for the First Circuit was, that in Massachusetts a claim against a company for breach of collective bargaining agreement was governed by the six year statute of limitations, and that a claim against a union for breach of duty of fair representation was governed by the three year statute of limi-

tations. See *DeArroyo* v. *Sindicato de Trabajadores Packing, A.F.L.-C.I.O.*, 425 F.2d 281 (1st Cir. 1977); *International Union, United Auto Workers, Aerospace, and Agricultural Implement Workers of America (U.A.W.) A.F.L.-C.I.O.* v. *Hoosier Corp.*, 383 U.S. 696, 701-705 (1966).

The Court of Appeals applied *Del Costello* retroactively and refused to consider the criteria laid out in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971).

Reasons For Granting The Writ

The decision by the Court of Appeals for the First Circuit below conflicts with the decisions of four other circuit courts on the issue of applying *Del Costello* retroactively.

Furthermore, to deprive Scaglione of his day in court because of a decision almost eight years after the fact is a gross miscarriage of justice and does violence to the principles set out in *Chevron Oil Company* v. *Huson*, 404 U.S. 97, 106-107 (1971).

It is clear that an individual employee may bring an action against his union for breach of the duty of fair representation in the mishandling of his or her grievances. *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). Until this court's decision in *Del Costello*, the federal courts applied the most closely paralelled statute of limitations provided by state law to determine the limitations period for breach of collective agreement claims and breach of duty of fair representation claims. *Hoosier Corp.*, *supra*. In *Del Costello*, this Court announced that the limitations period in 29 U.S.C., section 160(b) should be borrowed in actions for breach of collective bargaining agreement and breach of the duty of fair representation. The Court in *Del Costello* did not deal with the issue of retroactive application of the six-month limitations period set forth in 29 U.S.C., section 160(b).

Since the decision in *Del Costello*, the different circuit courts have applied their own interpretations, some applying *Del Costello* retroactively, and others not giving *Del Costello* retroactive application. Some of the circuit courts have applied the *Chevron* standards and some have not.

In *Graves* v. *Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984), *Del Costello* was applied retroactively to bar the plaintiff's action against his union for an alleged breach of the duty of fair representation where the basis for the action arose in 1982. That court stated three reasons for its holding, outlined and discussed below.

I. Retroactive Application Of The Six-Month Statute Of Limitations Would Result In Manifest Injustice.

First, the Court in *Graves* stated retroactive application of the six-month statute of limitations announced in *Del Costello* was supported by the "principle 'that a Court is to apply the law in effect at the time it rendered its decision, unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary.' (citations)" 736 F.2d at 820. However, applying the *Chevron* factors in this case clearly demonstrates that applying a 1983 decision to a situation which occurred in 1975, does result in "manifest injustice."

The second reason the Court stated in *Graves* for retroactive application of *Del Costello* is the "presumption on the federal courts in favor of retroactivity," 736 F.2d at 820. The court considered the factors guiding determination of retroactivity enunciated in *Chevron*. When the *Chevron* factors are applied to Scaglione's situation, they dictate a conclusion different from that reached in *Graves*. The three factors are:

> First, the decision to be applied non-retroactively must establish a new principle of law, either by over-ruling clear past precedent on which litigants may have relied. . . or by deciding an issue of first impression whose resolu-

> tion was not clearly foreshadowed. . . Second, it has been stressed that "We must. . . weigh the merits and demerits in *each case* by looking to the prior history to the rule in questions, its purpose and effect, and whether retroactive application will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive applications, for "where a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity."[1]

In *Graves*, the court found the first factor did not require retroactive application of the six-month statute of limitations since the change in statutes of limitations was foreshadowed in *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981); "We think it clear that, in light of *Mitchell*, the first factor weighs only slightly against retroactivity." 736 F.2d at 821.[2]

Plaintiff *Graves*, however, was discharged on September 14, 1982, was notified his grievance had been denied in November, 1982 (starting the running of the statute of limitations), and filed suit on July 15, 1983, events all occurring after *Mitchell* was decided in 1981. However, Mitchell was decided approximately six years *after* Scaglione's discharge in 1975. In 1977, the statute of limitations in this circuit for actions against unions for breach of the duty of fair representation was three years and actions against companies for breach of collective bargaining agreements was six years. *DeArroyo*, *infra*, there was no indication of imminent change. Scaglione relied on this clear past precedent. Thus the first *Chevron* factor re-

[1] 404 U.S. at 106-107

[2] In *Mitchell*, the Supreme Court ruled that an employee's claim against an employer was governed by the state statute of limitations for vacation of arbitration awards rather than for breach of contract. There was disagreement in the form of concurring opinions as to what limitations period was most analogous to claims brought, Justice Stuart recommending adoption of the § 10(b) statute of limitations.

quires that *Del Costello* not be applied retroactively to Scaglione's case.

II. *Chevron* Factors Governing Retroactivity Require Non-Retroactive Application Of The Six-Month Statute Of Limitations In This Case.

The second *Chevron* factor involves consideration of the prior history and the purpose and effect of the rule in question, and whether retroactive operation would further or retard such purpose and effect. The court in *Graves* found the "rule in question" namely the six-month statute of limitations, was "based on the need for uniformity, providing a satisfactory opportunity for an aggrieved employee to vindicate his rights, and the relatively rapid final resolution of labor disputes. 736 F.2d at 821, citing *Del Costello.* The court concluded such purpose supported retroactivity.

In Scaglione's case, such purposes would not be achieved by retroactive application of a limitations period barring suit on the merits. The purpose of uniformity is of little effect since there are few of any suits in the country filed in 1977 alleging breach of the duty of fair representation which remains on the dockets. Uniformity will be better achieved by applying *Del Costello* retroactively to all suits filed since this court's holding in *Mitchell.*

The stated purpose of providing the employee a "satisfactory opportunity" to present his or her case supports allowing Scaglione to proceed on the merits. In *Del Costello*, this Court *expanded* the period of time allowed to file suit from the ninety day period provided by New York law, to the six-month period specified in 29 U.S.C. §160(b), thus enlarging, not restricting employees' access to the courts.

The final purpose in the ruling in *Del Costello* cited by the court in *Graves* in support of retroactivity is the rapid resolution of labor disputes. This purpose refers to dispute resolution in general, not a particular case, since the merits of each case

dictates different periods of time required for resolution, Finding *Del Costello* to be non-retroactive beyond *Mitchell* would have no effect on the general application of the six-month statute of limitations.

The third *Chevron* factor is whether substantial inequity or injustice or hardship would result from retroactive application of a rule. The court in *Graves* determined that such hardship would not result:

> There has been no pre-trial discovery or assiduous preparation on the merits of the case; all that was done was to file a Complaint. Plaintiff has been stopped before he could get started; he has not been deprived of a judgment obtained before *Del Costello* came down. 736 F.2d at 822.

The situation for Scaglione is markedly different. Scaglione has vigorously pursued this case, first on his own in repeated efforts to enlist his Union's support in pursuing his grievances; when that proved unsuccessful, in filing suit against the Union and pressing that suit vigorously, appealing an adverse decision against him by the trial court to the Court of Appeals, obtaining relief in that court, and then following through in attempting to be heard on the merits in the trial court, and then a second appeal. Untold hours of work and concern over the course of years have gone into the pursuit of this case. Had Scaglione suspected in 1975 that in 1983 this court would find a requirement to file suit within six monts of his discharge, he would have done so. Since such a ruling was not foreseeable, since Scaglione maintained hopes that he could convince his Union to properly pursue his grievances, and since Scaglione believed that he had three years within which to file a suit against his Union and six years to file suit against his company and preserve his statutory rights, and since he believed that he had to allow his Union the opportunity to exhaust their internal proceedings before instituting suit, as outlined in the col-

lective bargaining agreement, he stayed out of court as long as he thought proper. When all of his efforts failed, he filed suit. According to the decision of the District Court, Scaglione was no more than a month late under a six-month statute of limitations. Equity demands that Scaglione not suffer for the rigorous pursuit of his rights.

III. Decisions In Other Circuits Do Not Support Denying Scaglione The Opportunity To Have His Claim Heard On The Merits.

The court in *Graves* stated that its third reason for applying *Del Costello* retroactively in that case was "the weight of precedent" 736 F.2d at 822. Eight other circuits have applied *Del Costello* retroactively.[3] However, none of those cases parallel Scaglione's on the facts or the history. None of the cases which specify dates on which causes of action arose is as old or as hard fought as this.[4]

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[3] *Barnett* v. *United Air Lines, Inc.*, 738 F.2d 358 (10th Cir. 1984) (RLA case applying *Del Costello* retroactively by analogy); *Assad* v. *Mt. Sinai Hospital*, 725 F.2d 837 (2d Cir. 1984); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, 53 U.S.L.W. 3289, (U.S. Oct. 15, 1984) (No. 83-1967); *Lincoln* v. *District 9 of Intern. Ass'n of Machinists*, 723 F.2d 627 (8th Cir. 1983); *Rogers* v. *Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), *cert. denied*, 53 U.S.L.W. 3289 (U.S. Oct. 15, 1984) (No. 83-1958); *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857, 861-62 (5th Cir. 1983); *Perez* v. *Dana Corp., Parish Frame Division*, 718 F.2d 581, 587-88 (3d Cir. 1983); *Ernst* v. *Indiana Bell Telephone Company, Inc.*, 717 F.2d 1036, 1038 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 707 (1984).

[4] Some of the following dates are approximations gathered from the decisions. *Barnett* v. *United Air Lines, Inc.*, 738 F.2d 358 (10th Cir. 1984) (cause of action arose in September 1978, suit filed October 1980); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, 53 U.S.L.W. 3289, (U.S. Oct. 15, 1984) (No. 83-1967) (cause of action arose April 1976, suit filed September 1978); *Lincoln* v. *District 9 of Intern. Ass'n of Machinists*, 723 F.2d 627, 630 (8th Cir. 1983) (cause of action arose in 1981, suit filed "over six months after the *Mitchell* case was decided"); *Rogers* v. *Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), *cert. denied*, 53 U.S.L.W. 3289 (U.S. Oct. 15, 1984) (No. 83-1958) (six suits consolidated: (1) cause of action arose April 1979, suit filed March 1980, (2) cause of action arose September 1980, suit filed August 1981, (3) cause of action arose

Two circuits noted that when plaintiffs had filed suit there was no clear past precedent existing upon which they could rely in waiting for so long as they did to file suit.[5]

Two Circuits have held *Del Costello* should not be applied retroactively. The Ninth Circuit has refused to apply *Del Costello* retroactively. *Edwards* v. *Teamsters Local Union #36*, 719 F.2d 103 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 1599 (1984).

The Sixth Circuit also has refused to apply the six-month statute of limitations period retroactively. That Circuit had adopted the six-month period prior to *Del Costello* since it found no applicable state law. *Badon* v. *General Motors Corp.*, 679 F.2d 93, 99-100 (6th Cir. 1982). In *Pitts* v. *Frito-Lay Inc.*, 700 F.2d 330, 333 (6th Cir. 1983), the court applied the *Chevron* factors and decided not to apply *Badon* retroactively.[6]

October 1979, suit filed May 1981, (4) cause of action arose October 1980, suit filed May 1981, (5) cause of action arose May 1979, suit filed June 1980, (6) cause of action arose May 1980, suit filed April 1981); *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857, 861-62 (5th Cir. 1983) (cause of action arose April 1980, suit filed April 1981); *Perez* v. *Dana Corp., Parish Frame Division*, 718 F.2d 581, 587-88 (3d Cir. 1983) (cause of action arose in October 1979, suit filed September 1981).

[5] *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857, 862 (5th Cir. 1983) (no established precendent upon which plaintiffs could rely); *Perez* v. *Dana Corp., Parish Frame Division*, 718 F.2d 581, 585 (3d Cir. 1983) (plaintiff was not relying on clear past precedent in waiting 23 months to file suit).

For Scaglione, clear past precedent existed specifying he had six years within which to file suit for breach of collective bargaining agreement against his company and three years for the breach of the duty of fair representation against his Union. *DeArroyo*.

[6] Indeed, in *Pitts* v. *Frito-Lay Inc.*, 700 F.2d 330 (6th Cir. 1983), the age and history of the suit there was comparable to this; the Plaintiff in *Pitts* was discharged in June, 1975; on June 25, the Union completed the third step of the grievance procedure but decided not to take the Plaintiff's case to arbitration. On October 31, 1977, he filed suit. He won a jury verdict which was appealed. The Sixth Circuit decided not to apply *Del Costello* retroactively.

The Second Circuit has carved out an exception to applying *Del Costello* retroactively. *Byrne* v. *Buffalo Creek Railroad*, 765 F.2d 364 (2d Cir. 1985).

The Fourth Circuit decided not to apply *Del Costello* retroactively because of a consideration of the *Chevron* factors. *Zemomick* v. *Consolidated Coal Company*, 762 F.2d 381 (4th Cir. 1985).

The Company did not raise the statute of limitations in the first appeal of this case to the Court of Appeals. Local 1395 did not raise the statute of limitations in their answer, nor did they raise it as an issue in the first appeal to the Court of Appeals.

It is obvious, with the benefit of hind-sight, that Local 1395 breached its duty of fair representation to Scaglione as soon as he sought their help in 1975. However, its breach of duty of fair representation continued unabated. On May 16, 1977, Scaglione requested information from Local 1395 concerning his grievances. Local 1395 never responded, Scaglione did not receive any information concerning the status of his grievances until December 28, 1978. In the package of information which Scaglione received, he learned for the first time how perfunctory the handling of his grievances by Local 1395 had been. One of the letters in the package of information dated October 14, 1977, indicated that Scaglione's case was considered closed at that time.

The obligation to represent all members in a bargaining unit fairly and impartially with complete good faith and honesty is a continuing and continuous obligation on the part of Labor Unions. *Vaca* v. *Sipes*, 386 U.S. 171 (1967). Therefore, Scaglione should be able to sue his Union at any time between August, 1975, up to and including December 28, 1978.

There have been at least ten petitions for writ of certiorari filed concerning the retroactive application of *Del Costello*. This Court can easily resolve the confusion and inconsistent decisions of the Circuit Courts by fashioning the following rule. This Court should find that *Del Costello* applies retroac-

tively only to cases where the statute of limitations began to run after the decision in *Mitchell* in 1981. This Court should find that those cases involving claims for breach of the duty of fair representation and claims for breach of collective bargaining agreements arising before *Mitchell* and filed in reliance on state statute of limitations, should not be barred from a hearing on the merits and should not apply *Del Costello* retroactively.

Conclusion

For the reasons set forth above, this Court should issue a writ of certiorari to review the decision of the Court below, and after granting such a writ, to reverse the decision of the First Circuit Court of Appeals and to establish a rule of retroactive application of *Del Costello* which can be consistently applied by all of the Circuits. *Del Costello* should only be applied retroactively to those cases which arose after *Mitchell*.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 84-1921

JOSEPH SCAGLIONE,

PLAINTIFF, APPELLANT,

v.

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1395, ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. RYA W. ZOBEL, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
TORRUELLA, *Circuit Judge*
and RE,* *Judge*.

Frederick T. Golder with whom *Golder & Shubow, P.A.* was on brief for appellant.

Thomas F. Birmingham with whom *Flamm & Birmingham* was on brief for Communications Workers of America, Local 1395.

John H. Mason with whom *David J. Kerman* and *Ropes & Gray* were on brief for AT & T Technologies, Inc.

April 17, 1985

PER CURIAM. In *Del Costello* v. *International Brotherhood of Teamsters*, 103 S.Ct. 2281 (1983), the Supreme Court held

* Chief Judge, of the United States Court of International Trade, sitting by designation.

that the six-month statute of limitations set forth in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), would apply to hybrid breach of duty of representation/breach of employment contract actions such as the case at bar. Although *Del Costello* was decided after Joseph Scaglione commenced this action, we recently held in *Graves* v. *Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984), that the period of limitation announced in *Del Costello* would apply retroactively. Since we held in *Simpson* v. *Director, Office of Workers' Compensation Programs*, 681 F.2d 81 (1982), that the decision to apply a holding retroactively, once made, governs all future applications of that holding, we are bound to apply the six-month period to Scaglione's claim, and will not entertain arguments that under the criteria laid out in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), its application to his particular situation is unwarranted.

The district court found after trial to the bench that Scaglione's cause of action against defendant Communications Workers of America, Local 1395, accrued before June 29, 1977. This determination, amply supported by the evidence, bars Scaglione's action against the Local, which was not commenced until December 29, 1977. Scaglione does not challenge the district court's conclusion that his causes of action against defendant AT&T Technologies, Inc. must have accrued simultaneously with or prior to the accrual of his cause of action against the Local; these actions are thus also barred. This conclusion renders without force Scaglione's argument that his actions against AT&T Technologies, Inc. are not time barred because they relate back to the time his action against the Local was filed.

Affirmed.

APPENDIX B

THE COURT: It seems more appropriate to deal with this matter while the evidence is fresh in my mind and my impressions of the witness and the testimony are still clear rather than taking it upstairs and putting it behind a large number of other files that need to be worked on.

The issue, as I understand it, and the sole issue on this part of the case is when did the Plaintiff's cause of action accrue?

It is agreed, as I understand it, that the complaint was filed on December 29th, 1977. Let me also state as background that I previously made three separate rulings that are relevant to a resolution of the issue as to when the cause of action accrued.

One was that I held that Del Costello's importation of the six month statute of limitations applies in this case. That is, Del Costello is retroactive, and, therefore, six months is the statute of limitations that governs the outcome of this case.

Second, I held, although you have not received any reasons for that, that the operative date is the filing of the complaint, not the service of the complaint on the Local Union, the Defendant Union.

Third, I held that the cause of action accrues when the Plaintiff has notice of the alleged wrongdoing by the Union. That is, when he had notice that the Union was engaged in arbitrary or bad faith conduct, including arbitrarily ignoring any meritorious grievance he may have had or processing it perfunctorily.

So the specific question all of this comes down to is when did the Plaintiff have such notice of the Union's wrongdoing, when did he know or when should he have known that the union would not process his grievance or that it was not doing so in a perfunctory manner.

I find that Mr. Scaglione is an articulate and an intelligent man. That is clear from the testimony as he gave it yesterday and today. It is clear also from the fact that graduated both from high school and a technical training course.

I also find that he is not unfamiliar with unions and how they work. Such familiarity is exhibited by the letter he wrote to the International in August of 1975, which is Exhibit 1 in the trial. It indicates an understanding of how unions work; it also tells me that his granrfather worked for Western Electric, his father worked for Western Electric, his mother worked for Western Electric, and that together with the testimony about his father setting up meetings with Mr. Burns suggests that it was, if you will, a union family. So to the extent that Mr. Scaglione suggested that he's totally ignorant of how unions work and how grievance processes work, I do not credit that.

I believe that he had some considerable knowledge of unions, how unions function and in the work place.

I also find that he was not familiar word by word with the collective bargaining agreement, that he had a general familiarity with what was referred to as the Union Book and later identified as the collective bargaining agreement.

And I don't think there is any question but that the collective bargaining agreement is the document that describes the grievance procedure, which is in part at issue in this case.

Now, without deciding the case against the union on the merits, I'm not in a position to do that because I have not heard all of the evidence, and I only heard it as it bore on the issue that is presently before me.

I must say that from what I have heard, the Local did not, to say the least, extend itself on behalf of Mr. Scaglione. It did little more than nothing on his behalf.

The evidence shows that somewhere around August 27th, within one or two days after the five-day suspension notice, it did succeed in having that filed, if you will, and I use the term in the criminal law sense; that is, as I understand it, it was put in a file to be left there for a period of time and ultimately removed if Mr. Scaglione's work was satisfactory for a protracted period of time, as noted in one of the exhibits.

In connection with Mr. Scaglione's complaints the next incident was a meeting with Mr. Gallagher on December 12th of 1975. On December 18th, 1975, Mr. Gallagher filed something akin to a grievance with the Company. In January of '76, Mr. Scaglione had what has been described a chance meeting with Mr. Burns. It was a chance meeting in the sense that it was not a meeting set up specifically for the purpose of discussing his grievance.

Mr. Burns did on February 12th, make inquiry to Western Electric concerning Mr. Scaglione. And on February 21st, submitted to Western Electric the report that Mr. Scaglione had sent to Mr. Burns.

It reported to the Master Bargaining Committee in March that he had nothing more. And also in March, Mr. Burns sent to the National Mr. Scaglione's own report.

In May of '76, Mr. Burns notified Western Electric that he had no new information concerning Mr. Scaglione, and in September of '76, acknowledged to the International the return of the question to the Local.

Now, of this series of events, Mr. Scaglione was aware of three. He was aware of what the Union had done in August of '75 concerning the five-day suspension letter. He was aware because he was present of the meeting with Mr. Gallagher. And he was certainly aware of the meeting with Mr. Burns in January of '76. That is what he knew.

And taking his testimony at face value, and I credit his testimony on that, he didn't know of any of the other things done between January of '76 and September of '76 by Mr. Burns. That is, the forwarding of reports to Western Electric and to the International the further denial of any additional information to Western Electric and the receipt back from the International of the file that had been sent.

I note that there was some additional action by Burns during this period of time concerning Mr. Morello and Mr. Ferrante.

Now, between January of '76 and May of '77, the Plaintiff, Mr. Scaglione, heard nothing from the Union or from Mr. Burns. And he was rebuffed in absolutely every attempt to meet with or talk with Mr. Burns. I credit his testimony on that completely.

Meetings were set up and Mr. Scaglione would show, Mr. Burns would not. My recollection of the testimony is that happened anywhere between four and five or six or seven times.

Mr. Scaglione placed telephone calls to Mr. Burns at his home, and was told inevitably that Mr. Burns was not there.

Mr. Scaglione attempted to call Mr. Burns at the Union Hall, and the telephone there went largely unanswered.

Mr. Scaglione finally in May, sometime in May, got through to Mr. Burns, only by a rouse, by pretending to somebody else. When he talked to Mr. Burns, Mr. Burns told him that he would begin to work on his case in seven to ten years.

The next event was the letter sent by Mr. Scaglione to Mr. Burns on May 16, 1977, a letter which I note was sent by certified mail.

The evidence shows that Mr. Scaglione was dissatisfied with the Local as early as August of '75. That was when he wrote the letter to the International. I find that he suspected that it was not doing its job on his behalf as early as December 12th, 1975, which was the date of the meeting with Mr. Gallagher, which as a precaution, Mr. Scaglione taped.

He got up hope for his cause with Mr. Burns' election. He talked with Mr. Burns; Mr. Burns appeared to encourage him. And as a result, he sent a report to Mr. Burns.

But at some point between that January 1976 meeting with Mr. Burns and the sending of the letter on May 16th, 1977, Mr. Scaglione knew, he knew full well that Mr. Burns would do nothing, that the Local would do nothing on his behalf. That knowledge was confirmed by the statement that Mr. Burns made to him that he would begin to work in seven to ten years on Mr. Scaglione's case.

And I accept Mr. Scaglione's statement that he sent the 5/16/77 letter as evidence. That is, he put in writing what he already knew and in order to make sure that there was no question that the Union would not act in that, it would not respond to the letter and that is also one of the reasons why he sent it by certified mail, so he would have proof that in fact a letter was sent.

As a result of these findings, I now find that such question as remained after the summary judgment motion as to the Plaintiff's state of mind, I must now resolve against him based on his own testimony that he knew by May 16th that the Union would do nothing.

Accordingly, judgment will be entered for the Union, which I think is the end of the case.

Thank you all very much for the fair and professional way in which you tried this part of the case.

I return the exhibits to counsel.

[Whereupon the nonjury trial was adjourned at 11:20 a.m.]

I certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

_____

James E. McLaughlin

[NOT FOR PUBLICATION]

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 81-1686

JOSEPH SCAGLIONE,
PLAINTIFF, APPELLANT,

v.

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1395, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. RYA W. ZOBEL, *U.S. District Judge*]

Before
CAMPBELL AND BREYER, *Circuit Judges*,
AND MURRAY,* *Senior District Judge*.

Frederick T. Golder with whom *Cherwin & Glickman*, was on brief, for appellant.

Thomas F. Birmingham with whom *Nathan S. Paven*, and *Flamm, Kaplan, Paven & Feinberg* were on brief, for appellee Communications Workers of America, Local 1395.

John H. Mason with whom *Francis J. Vaas*, and *Ropes & Gray* were on brief, for appellee Western Electric Company.

BREYER, *Circuit Judge.* Joseph Scaglione, the plaintiff and appellant in this case, sued his Union, Local 1395 of the Communication Workers of America, and his former employer, Western Electric Company, claiming that the Company had arbitrarily discharged him in violation of its contract with the Union. The Company admitted in its answer that Scaglione was discharged on October 31, 1975 "for certain misconduct engaged in. . . on October 30, 1975 plus [Scaglione's]. . . prior job suspensions and warnings." Scaglione states that the prior job suspensions and warnings (received on July 31, August 14, and August 27, 1975) were all "totally unjustified." According to his accompanying affidavits, these disciplinary actions were the result of a personal vendetta by Scaglione's supervisor, discrimination on grounds of national origin, Company overreaction to his justifiable response to unreasonable Company work practices, or some combination of these factors. The Company, not surprisingly, denies all this and claims that Scaglione's dismissal could not have been arbitrary given the admitted fact that Scaglione walked off his job in violation of orders on October 30, 1975, the day preceding the discharge.

The collective bargaining agreement which is the basis of Scaglione's substantive right to continued employment with the Company sets forth a specific procedure for dealing with grievances such as his discharge. Ordinarily, Scaglione would be entitled to no more than the processing of his contractual grievance through that contractually agreed upon procedure. *Cf. Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 657-59 (1965). Yet, he can assert his breach of contract claim against his employer in court if—but only if—the contract's grievance procedure failed him because the Union breached its duty to represent him fairly by "act[ing] in bad faith, discriminatorily, or arbitrarily." *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967). In this context, "arbitrarily" includes the situation where the Union's processing of a grievance is "perfunctory"—a term suggesting that the union's actions are close to lacking in a

"rational basis." *Figueroa de Arroyo* v. *Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 284 n.4 (1st Cir. 1970). *See Vaca* v. *Sipes*, 386 U.S. at 191 ("a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion. . ."). Scaglione has charged that the Union's processing of his grievance was characterized by perfunctoriness and bad faith. The Company and the Union both deny this.

Following discovery and before trial, the Union and the Company moved separately for summary judgment. The Union's motion primarily addressed the adequacy of its representation of Scaglione. The Company's motion addressed both this question and whether Scaglione's discharge was "arbitrary"—the sole basis under the contract for setting aside the employer's decision. The district court granted summary judgment. It considered only the "representation" question. The court wrote that "the evidence addressed establishes that, in fact, the Local pursued every step available to it under the collective bargaining agreement in a timely and diligent fashion." Scaglione appeals from the district court decision.

In essence, Scaglione's claim is that summary judgment was inappropriate because there were material disputed facts genuinely at issue. Summary judgment should only be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact. . . ." Fed. R. Civ. P. 56(c). Because the defendants, as moving parties, have "the burden of showing the absence of a genuine issue as to any material fact. . ., *Adickes* v. *Kress & Co.*, 398 U.S. 144, 157 (1970); *Mack* v. *Cape Elizabeth School Board*, 553 F.2d 720, 722 (1st Cir. 1977), we are required to look at the entire record "in the light most favorable" to Scaglione. *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962); *Gual Morales* v. *Hernandez Vega*, 579 F.2d 677, 680 (1st Cir. 1978). So viewing the record we conclude that there were genuine, material disputed issues of fact and that summary judgment should not have been entered.

I

We focus first on the adequacy of Union representation, the issue decided by the district court. We derive the precise "union behavior" questions from Scaglione's complaint. He there states he was discharged on October 31, 1975. *Complaint* ¶ 9. He adds that "on or about February 21, 1976," the president of Local 1395, "submitted a grievance to Western Electric Company at the request of the plaintiff based upon the plaintiff's statements that the actions of Western Electric Company in suspending and terminating plaintiff were not justified." *Id.* ¶ 10. He next says that "subsequent to the filing of the aforementioned grievance, the defendants have taken no further affirmative action...despite numerous requests [that they do so]." *Id.* ¶ 11. He concludes that "by not prosecuting plaintiff's grievance with Western Electric Company" defendants have breached their duty "concerning representation of plaintiff with Western Electric Company." *Id.* ¶ 14. In other words, Scaglione charges that the Union failed to represent him properly in processing his grievance arising out of his October 31, 1975 discharge.

Keeping the scope of the claimed breach in mind, we turn to the allegations and facts on the record before us. We note that the record is in a state of untidiness that breeds mistakes; some apparently relevant documents are attached to motions and briefs while others are not; and the briefs contain citations to at least one important document that does not appear in the record (the "Gallagher deposition"). Nonetheless, treating the papers and arguments before us as those upon which the district court based its decision, we have distilled from them two sets of factual statements. The first, stressed by Scaglione, we label "S1" through "S11." The second, stressed by the Union, we label "U1" through "U9." Scaglione's "facts," drawn primarily from his affidavit (S1 through S8), supplemented by affidavits of two co-workers, Linda Ferrante (S9) and Peter Morello (S10), include the following:

S1. Scaglione asked the Union to grieve the warnings and suspensions he received on July 31, August 14, and August 27, 1975.

S2. The Union took no action as to the first two of these; it did act on the third.

S3. Scaglione wrote to the National Union in Washington complaining that he had been unfairly treated by the Company when given these warnings and suspensions. Officers of the Local union complained to Scaglione about his "going over their heads."

S4. Two months after Scaglione's October 31 dismissal (in January 1976), the new president of the Local, Frank Burns, told Scaglione he had no facts on his case and asked Scaglione to write up a statement of facts.

S5. Although Burns led Scaglione to believe this statement would provide the basis for further Union investigation, Burns did no more than forward this statement to the Company with a brief cover letter in support of the grievance.

S6. After January, Scaglione frequently tried to contact Burns to talk about his grievance. He succeeded in contacting Burns only two or three times.

S7. With one exception, each of these contacts consisted of Burns and Scaglione simply agreeing to meet at the union hall. Burns did not show up at any of these meetings.

S8. The one exception consisted of a telephone call when Scaglione did not identify himself and was put through to Burns. Scaglione asked for a meeting and a copy of his file. Burns told Scaglione, "I'll start to work on your case in seven to ten years."

S9. On May 16, 1977 (after the S8 telephone call) Scaglione wrote Burns complaining about the Union's handling of his grievance and requesting his file. He received no answer.

S10. Linda Ferrante, who was discharged along with Scaglione, states that when she discussed her own grievance with Burns, he said "with respect to Mr. Scaglione's grievance that he 'wasn't going to waste his time with Scaglione' and that he was very upset because 'Joey went over his head and went to the National.' "

S11. Peter Morello, another co-worker, states that "Mr. Burns said to me that we are going to separate Linda's case from Joe's. When I asked why, he said that 'Joe is too nervous and that he was not going to waste his time with Scaglione.' He also was very upset that 'Joey went over my head and went to the National.' "

The Union (and Company) facts, drawn from various affidavits, letters, and other documents, include the following:

U1. Between October 31, 1975, when Scaglione was discharged, and January 1976, when Burns became president of the local union, Bernard Gallagher, who was then the Local's president, visited Scaglione, compiled facts, and filed a written grievance with the Company, protesting Scaglione's discharge along with other matters.

U2. The written document that Burns asked Scaglione to prepare (S4, S5) amounted to a seven page notarized statement. Burns sent this document to the Company on February 21, 1976, along with a cover letter stating that the "Local at this time would like to submit the following enclosed report as part of the grievances concerning Joseph Scaglione and Linda Ferrante."

U3. The collective bargaining agreement provides that disputes that cannot be resolved at the Local level can be referred to a Master Bargaining Committee (MBC). Burns referred Scaglione's grievance to the Committee on March 19, 1976. (The referral letter is signed by

Burns as local president and W.R. Clancy, company manager. The letter indicates that various documents, including the Gallagher and Burns December and February grievance letters, are attached.)

U4. On April 1, 1976, M.V. Kennedy, a Union/MBC official, acknowledged in a letter to Burns receipt of the March 19 letter. (Kennedy's letter states, "I received from you the above cases [referred to] in your cover letter.... This is the first written knowledge of these cases I have received. In order to process them through the grievance procedure I must have the Local's grievance letters to Mr. Clancy and his answers to the Local, plus a signed transfer by you and Mr. Clancy. When we receive this, we can proceed to process these grievances formally.")

U5. On August 18, 1976, Kennedy sent the grievances back to Burns. (Kennedy's letter states that at the last MBC meeting "it was agreed by both parties that the information contained in these grievances from both labor and management was totally inadequate.... Therefore, it was agreed to return these grievances to the local level for reprocessing.... We want exchange of position letters on these grievances where all the facts are aired out.... Under the present contract, no grievances can be transferred without a change of statements and a transfer letter signed by both the Local President and the House Manager.")

U6. Burns reinvestigated the case. He had (in his words) "countless conversations with Mr. Scaglione about the case, [during which] he never provided me with new information not contained in his written statement."

U7. On September 8, 1976, Burns wrote to Clancy asking for "all correspondence" relevant to Scaglione's grievance (and to that of Ferrante) to expedite MBC consideration.

U8. On August 8, 1977, one year later, Clancy wrote to the National Union's director, Kenneth Bergstrom, explaining in detail why Ferrante's grievance was denied. He states that Scaglione's grievance is being handled separately.

U9. On October 14, 1977, Burns received a letter from Bergstrom stating that the MBC considered both the case of Scaglione and that of Ferrante "closed at the national level." (The letter added, "We returned these two cases back to the Local level on August 18, 1976 and with no new evidence forthcoming and with the review we have made. . . we have no choice but again to repeat that we consider these cases closed.")

Were we to consider only the period before early 1977, we would agree with the district court that these two sets of factual statements (each supported by affidavits or documents) show no genuine, material conflict. Scaglione's assertions of pre-discharge union failure (S1, S2) are not directly relevant to the charge he levies against the Union in his complaint (failure to pursue his discharge grievance). The statements (S4, S5, U1, U2, U3) without contradiction, suggest adequate representation by Gallagher and by Burns, in sending letters to the Company, in attaching a statement of facts, and in referring the matter further to the MBC. Even were we to accept Scaglione's claim that this early processing was not "diligent," the Union is not held to a standard of diligence, nor is it even required to avoid all "negligence" or "poor judgment" in processing grievances. *Brough* v. *Steelworkers*, 437 F.2d 748, 750 (1st Cir. 1971); *Dente* v. *Masters, Mates and Pilots*, 492 F.2d 10, 12 (9th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974); *Bazarte* v. *United Transportation Union*, 429 F.2d 868 (3d Cir. 1970). Rather, it is forbidden to treat grievances in a "perfunctory" or "arbitrary" way, and before early 1976 the facts do not show such treatment.

The picture looks very different, however, once one focuses on 1976 and 1977. The district court writes that once the MBC sent Scaglione's grievance back to the Local, "Mr. Burns then reinvestigated the grievance by discussing it with the individuals involved, and, finding no new evidence to support plaintiff's grievance, he resubmitted it to the Master Bargaining Committee." But, this is Burns' view of the matter, not the view of Scaglione. To the contrary, S6, S7, S8 and S9, all backed by affidavits, suggest that Burns did not talk to the individual primarily involved (*i.e.*, Scaglione), from which one might conclude that he did not "reinvestigate." These statements conflict squarely with U6, backed by Burns' affidavit. The conflict about what happened—about whether Burns spoke to Scaglione and reinvestigated—is genuine.

We also believe the conflict is material for two sets of reasons. First, Scaglione argues that *special* circumstances here made it necessary for the Local to act further in 1976 and 1977. The MBC's letters of April 1, 1976 and April 18, 1976, apparently asked the Local 1) to provide a transfer letter, 2) to provide a statement of the issues and facts as seen by the Local and management, and 3) to provide additional facts if appropriate. (See our parenthetical quotations in U4 and U5.) The Local need only have pointed out that it had already sent a transfer letter (U3 seems to fill this bill), obtained management's statement of issues and facts (already having Scaglione's version on hand, U2), and stated that it had no additional facts. To do this, as arguably requested by the two MBC letters, would (also arguably) have imposed little burden on the Local. But, Scaglione contends that the Local, instead, did nothing at all. He adds that this failure to comply with these very simple MBC requests in part led to dismissal of his grievance. And, the presence of detailed factual "rejection" statements in Ferrante's case (see U8), but not Scaglione's, and the final MBC rejection letter (see U9) are consistent with this claim.

Second, Scaglione claims that the Local's inaction reflected personal hostility, perhaps in part based upon his taking a previous grievance to the National Union "over the head" of the Local. While the Union and the Company deny this, Scaglione cites in support particular statements that he, and others, say they heard Burns make. See S3, S8, S10, S11. Whether or not such statements were ever made and/or what they meant in context are matters of dispute.

When this (disputed) issue of motive is combined with the (possibly disputed) claim that the Local was asked by the MBC to do no more than meet easy procedural requirements (in 1976 and 1977), and that, in turn, is combined with the factually disputed contention that the Local did nothing whatsoever despite continued requests, we believe the factual issues are "material" as well as "genuine." That is to say, there is a triable issue of "perfunctory" or "arbitrary" treatment by the Local of Scaglione's grievance. We stress that we are not saying that a local need always, or even often, carry a grievance to higher levels within the union, nor that it need always reinvestigate, even on the request of higher authorities, nor that it need even carry out every procedural step required to process a grievance. What we say here is limited to the particular factual circumstances that Scaglione argues—improper motivation, failure to take even the simplest procedural steps to perfect the appeal that the Local, itself, *says* it wished to take, and all this without any apparent justification. We also stress that the Local may well be able to show these factual claims of Scaglione are false or to produce legitimate justification for its actions. We do no more here than find a genuine, material issue of fact on the basis of the papers before us.

II

The Company argues that, even if the Union breached its duty of fair representation, there is no triable issue of fact concerning its own breach of the collective bargaining contract. That contract allows the Company to discharge Scaglione

unless its action was "arbitrary." The Company claims that the discharge could not have been arbitrary because Scaglione admitted that he walked off the job on October 30, 1976, and he also admits that he had several prior warnings and suspensions in his record. The district court did not pass upon this contention.

We do not find the matter sufficiently clear in the record to require the district court to grant summary judgment on this basis. Scaglione's assertion of "arbitrary" behavior by the Company rests upon the Company's discharge *along with* the Company's previously warning and suspending him. He claims that each of these disciplinary actions was unwarranted and improper. The Company admits in its answer that Scaglione would not have been discharged for the October 30 conduct alone; it was the combination of October 30 "plus . . . prior job suspensions and warnings" that led to the discharge. Nor does the Company refute in detail Scaglione's assertions of bias and other improper supervisory conduct that he says underlay his previous discipline. The facts that all this discipline was meted out by the same supervisor and that previously Scaglione worked for five years with virtually no discipline tend to support his claim. Moreover, it is possible that even if the Union breached no "grievance" duty in respect to this previous discipline, the Company was still arbitrary in basing Scaglione's discharge upon it. That depends upon the facts and the habits, customs, and expectations of the workplace—as to which the parties are apparently not in agreement. Thus, we cannot say on the record now before us that the Company has established it is entitled, as a matter of law, to prevail against Scaglione. In so saying, we, of course, do not mean to endorse Scaglione's position. We hold merely that the existence of unresolved factual issues precludes summary judgment at this time.

Vacated and remanded.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 79-1044-Z

JOSEPH SCAGLIONE

v.

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1395, AND WESTERN ELECTRIC COMPANY

MEMORANDUM OF DECISION

ZOBEL, D.J.

Plaintiff brought this action under Section 301 of the National Labor Relations Act, 29 U.S.C. §185, against the Communications Workers of America, Local 1395 ("Local 1395") and Western Electric Company ("Western"). He seeks damages against Western for wrongful termination, breach of his employment contract, and defamation. In addition, he alleges that Local 1395 breached its statutory duty to fairly represent him in the prosecution of his grievances against Western. Both defendants have moved for summary judgment.

In support of its motion for summary judgment, the Local has submitted an affidavit with supporting documents which discloses the following undisputed material facts. Plaintiff, a former employee of Western, was a member of the Communications Workers of America at all times material to this action. During this period Local 1395 served as the plaintiff's exclusive bargaining agent at Western's facilities in Watertown and Southborough, Massachusetts. On October 31, 1975 plaintiff was discharged from his position as a telephone selector. Prior to his discharge plaintiff had received a series of

disciplinary warnings and suspensions.[1] Upon his discharge, allegedly for unsatisfactory job application and performance, plaintiff brought his grievance to the attention of the then President of Local 1395, Bernard Gallagher. Mr. Gallagher conducted an investigation into the matter including visiting plaintiff at his home, and filed a written grievance protesting plaintiff's discharge on December 18, 1975.

In January of 1976, Francis Burns, the newly elected President of Local 1395, met with plaintiff and instructed him to prepare a written statement setting forth all the facts in support of his grievance. Such a statement was in fact prepared and notarized and Mr. Burns submitted it as part of Local 1395's argument against plaintiff's discharge. In March of 1976, when the Union's efforts at the local level proved unavailing, Mr. Burns referred plaintiff's grievance to the Master Bargaining Committee, as provided for in the collective bargaining agreement. This Committee is composed of representatives of the International Union and of Western. On August 18, 1976 the Master Bargaining Committee referred the matter back to Local 1395. Mr. Burns then re-investigated the grievance by discussing it with the individuals involved and, finding no new evidence to support plaintiff's grievance, he resubmitted it to the Master Bargaining Committee. On August 31, 1977 that Committee denied plaintiff's grievance. Subsequently in October, 1977 the International concluded that plaintiff's grievance did not merit referral to arbitration.[2]

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[1] On July 30, 1975 plaintiff was warned and suspended for unsatisfactory job application and performance. Two weeks later, on August 14, 1975 plaintiff was suspended again for leaving through an unauthorized exit, failure to register his departure on his time card, failure to sign out and failure to obtain authorization to leave his job. On August 27, 1975, plaintiff was suspended for the third time for poor job application and performance, however this suspension was subsequently reduced to a final warning as a result of negotiations between Western and the Local.

[2] Plaintiff has also been unsuccessful in pursuing various other avenues of relief. On February 13, 1976 plaintiff's claim for unemployment benefits was rejected after a hearing by the Massachusetts Division of Employment

Western argues that plaintiff cannot maintain an action under Section 301 for breach of contract and wrongful termination because his rights are exclusively governed by the elaborate grievance and arbitration procedures contained in the collective bargaining agreement covering the rights of the parties at all times material to this action. Since these procedures were fully complied with, Western asserts plaintiff has exhausted all remedies to which he is entitled.

It is undisputed that the collective bargaining agreement between Western and the Communications Workers of America in effect at the time of the termination of plaintiff's employment provided the plaintiff with grievance and arbitration procedures which were intended to be the exclusive means for enforcing the employee's rights under the Agreement. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). These procedures were in fact complied with in this case. Consequently, the only way in which plaintiff can prevail against Western on his breach of contract and wrongful termination claims is to establish that he was effectively denied his remedies under the collective bargaining agreement by the Union's breach of its duty of fair representation.

It is well established that a breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967). A union behaves arbitrarily when it ignores a meritorious grievance for no apparent reason or processes it with only perfunctory attention. *Vaca* v. *Sipes*, 386 at 191. Plaintiff asserts that the Local breached this duty by failing to adequately prosecute his claim and by the conduct of Mr. Burns in failing to make himself available to discuss plaintiff's

---

Security on the ground that he had been fairly discharged for willful misconduct after receiving a series of warnings. Subsequently, in June, 1976 the EEOC issed a determination that there was no reasonable cause to believe that Western had engaged in unlawful employment practices in terminating plaintiff's employment.

grievance. However, the evidence adduced establishes that in fact the Local pursued every step available to it under the collective bargaining agreement in a timely and diligent fashion. At no time did the Local seek to delay, nor did it fail to pursue the next remedy provided for by the collective bargaining agreement. Since the Local has no authority to refer a case to arbitration, it processed plaintiff's grievance to the full extent of its authority. Consequently, plaintiff's action against the Local under §301 fails as a matter of law.

Since all of plaintiff's remedies under the collective bargaining agreement were in fact fully and adequately pursued, no action may lie against Western for breach of contract or wrongful termination. Consequently, these claims too fail as a matter of law.

Finally, plaintiff alleges that he was defamed by Western in false oral and written statements referring to his improper job performance. Pendent jurisdiction of this state law claim depends upon the existence of a "federal claim of sufficient substance to confer subject matter jurisdiction on the court" and of "a common nucleus of operative fact" from which both federal and state law claims derive. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). But plaintiff's §301 claim lacks sufficient substance to confer subject matter jurisdiction on this Court. Consequently, the jurisdictional parameters set forth in *Gibbs* preclude an adjudication of the defamation allegations.

Accordingly, the motions for summary judgment of both defendants are allowed.

(s) RYA W. ZOBEL
District Judge

August 7, 1981
DATE

APPENDIX E

29 U.S.C. § 185

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

APPENDIX F

29 U.S.C. § 160(b)

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10... (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

Supreme Court, U.S.
FILED
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No. 85-416 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPH SCAGLIONE,

Petitioner

v.

COMMUNICATIONS WORKERS OF AMERICA LOCAL 1395 and AT&T TECHNOLOGIES, INC.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT AT&T TECHNOLOGIES, INC.

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QUESTIONS PRESENTED

1. Should Del Costello, decided by this Court in 1983, establishing a six-month statute of limitations for actions by individuals against their unions and companies, be applied retroactively to bar a suit brought in 1977, when the appropriate statute of limitations was six years against companies and three years against unions?

2. Should the statute of limitations begin to run when the union has not informed its member that it has concluded its processing of the grievance?

3. Does a union owe a fiduciary obligation to its members which requires it to notify its members in writing that it has concluded the processing of a grievance, and of a right to bring suit for breach of the duty of fair representation?

4. Whether the statute of limitations in a suit by an individual against the union should begin to run where the union is still pursuing the grievance.

5. When should the statute of limitations begin to run against a union for breach of the duty of fair representation?

PARTIES

Petitioner and respondents are identified in the petition.

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IN THE

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet., App. A) is not reported. The opinion of the Court of Appeals denying rehearing is not reported. The Memorandum of Decision of the District Court granting the motion of respondent AT&T Technologies, Inc. for summary judgment is not reported. The Memorandum of Decision of the District Court granting the motion of respondent Local 1395 of the Communications Workers of America for summary judgment (Pet., App. B) is not reported. An earlier opinion of the Court of Appeals (Pet., App. C) is not reported. An earlier Memorandum of Decision of the District Court (Pet., App. D) is not reported.

JURISDICTION

The Court of Appeals issued its opinion affirming the decision of the United District Court on April 17, 1985. A timely petition for re-hearing was denied on June 10, 1985.

This court has jurisdiction pursuant to 28 U.S.C., section 1254(1).

STATUTES AND RULE INVOLVED

This case involves the interpretation and application of 29 U.S.C., section 185 and 29 U.S.C., section 160(b). The texts of those statutes are set forth respectively in Appendices E and F of the Petition.

Rule 52(a), Fed. R. Civ. P., provides in pertinent part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

STATEMENT OF THE CASE

Petitioner, Joseph Scaglione, was discharged from his employment as a telephone selector with Western Electric Company, now known as AT&T Technologies, Inc. (the "Company") in October, 1975 for continuing unsatisfactory job application, performance, attitude and insubordination, including walking off his job on the night preceding his discharge. Following his discharge, petitioner sought to prosecute a grievance with respect to it in accordance with the procedures set forth in the collective bargaining agreement (the "Agreement") then in existence between the Company and the Communications Workers of America (the "CWA"). Under the Agreement, the entity having responsibility for the initial prosecution of the grievance was Local 1395 of the CWA ("Local 1395" or the "Union"), which was the Local having responsibility for the Company's warehouse in Southborough, Massachusetts, where petitioner was employed.

Petitioner met with representatives of the Union with respect to his grievance in December, 1975 and again in January, 1976. Thereafter, petitioner had no further contact with the Union until May, 1977 when, in response to an inquiry about the status of his grievance, petitioner was allegedly told by the person who was then president of the Union, Francis J. Burns, that he — Burns — would work on petitioner's case in "seven to ten years."

In December, 1977, petitioner commenced this action in the Superior Court of Massachusetts alleging that the Union and Burns had improperly failed to prosecute the grievance with respect to his discharge. In April 1979, petitioner moved to amend his complaint by naming the Company as an additional party defendant and adding new allegations that his discharge violated the Agreement and that the Company had libeled or slandered petitioner in connection with his discharge. The Superior Court allowed this motion to amend on April 9, 1979.

The Company removed the case to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1446. On June 11, 1979, the Company filed an answer to the amended complaint in which, among other things, it denied the substance of petitioner's allegations, and raised the affirmative defense that the amended complaint was barred by the applicable statute of limitations.

From June 1979 through January 1981, petitioner served a set of document requests on defendants and took two depositions, each lasting approximately one-half day. Thereafter, on January 16, 1981, the District Court held a pretrial conference at which petitioner agreed to dismiss his complaint against Burns. On February 4, 1981, the Company moved for summary judgment on the grounds that petitioner's own deposition showed that he had been properly discharged and that he had alleged no facts showing that the Union had breached its duty of fair representation in connection with the discharge. On February 25, 1981, the Union

also moved for summary judgment and, in support thereof, filed an affidavit of Burns.

On August 7, 1981, the District Court granted defendants' motions for summary judgment and, in connection therewith, issued an opinion concluding that petitioner had failed to raise a genuine issue of material fact with respect to whether the Union had breached its duty of fair representation in processing his discharge grievance. Pet., App. D. On appeal, the District Court's judgment was reversed and remanded in an opinion issued by the Court of Appeals on June 22, 1982. The Court found that petitioner had raised a genuine issue of material fact with respect to the Union's processing of his grievance. Pet., App. C.

On remand, petitioner unsuccessfully moved to transfer the case to another judge on the ground that the judge who had previously granted defendants' motions for summary judgment was prejudiced against him. Thereafter, on April 29, 1983, the District Court issued an opinion denying petitioner's motion to add a claim for breach of the implied duty of fair dealing.

In August, 1983, the defendants moved for summary judgment on the grounds that the United States Supreme Court's decision in *Del Costello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983) established that petitioner's amended complaint was barred by the six month statute of limitations set forth in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b).

After holding a hearing, the District Court on November 15, 1983, denied the Union's motion for summary judgment, but granted the Company's motion. In an accompanying opinion, the Court held that since petitioner's cause of action against the Company accrued on or before December 29, 1977, it was barred by the applicable six month statute of limitations. The Court also held that petitioner had asserted no facts that would toll the statute and that his amended complaint against the Company did not relate

back to the date petitioner filed his original complaint against the Union defendants in December, 1977 (*Id.*). In the same opinion, the District Court found that there was a material dispute as to when petitioner became aware or should have become aware that Local 1395 would not pursue his grievance.

On October 9, 1984, a trial was commenced, limited to the threshold issue of when petitioner's cause of action accrued against the Union. After hearing testimony and evidence from the petitioner, the District Court on October 10, 1984 ruled that petitioner's action had accrued against the Union prior to June, 1977, and hence was barred by the six month statute of limitations. The District Court accordingly entered judgment for the defendants. Pet., App. B. The Court of Appeals affirmed the District Court's opinion on April 25, 1985, and denied rehearing on June 10, 1985. Pet., App. A.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals affirming the judgment of the District Court is consistent with the decisions of this Court and other courts of appeal. The petition does not present any issue warranting review by this Court.

1. The first question suggested by the petition — whether this Court's holding in *Del Costello* v. *International Brotherhood of Teamsters* should be applied retroactively to so-called hybrid actions brought under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, prior to April, 1981, when the Court announced its opinion in *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981) — has been answered by the Court in *Del Costello* itself and in its companion case, *United Steel Workers* v. *Flowers*. In both *Del Costello* and in *Flowers* the Court applied the six month limitations period to actions which had been brought in 1978 and in 1979 respectively. 462 U.S. at 155-158. The circumstances of the *Del Costello* and *Flowers* cases are the same

in all pertinent respects as the present case, and there is no basis for reaching a different result here. See also *Mitchell*, 451 U.S. at 64 (approving district court's retroactive application of 90-day limitation period imposed by New York arbitration statute to suit under §301 commenced in July, 1978).

Petitioner nevertheless asserts that the factors outlined in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), compel a holding of nonretroactivity here. This is not correct. The factors outlined in *Chevron* are not satisfied in this case:

(a) *Del Costello* did not overrule "clear past precedent" in the First Circuit, as petitioner asserts. Pet. 8. While there was dicta in *De Arroyo* v. *Sindicato De Trabajadores Packing, AFL-CIO*, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970), indicating that the state contract limitations period was applicable to an employee's suit against his employer for breach of a collective bargaining agreement, the question was not decided in *De Arroyo* which held only that the one year Puerto Rico tort statute of limitations applied to an employee's § 301 suit against his *union*.

(b) Nor does a consideration of the purpose and effect of the rule in question support a finding of nonretroactivity, as petitioner asserts at pages 9-10 of his petition. In fact, as numerous courts of appeal have repeatedly recognized, the purposes of the *Del Costello* rule were to achieve uniformity of treatment among similar cases and promote the finality of grievance-arbitration decisions. These purposes clearly would not be served, but in fact would be substantially eroded, by a failure to apply *Del Costello* retroactively. *E.g.*, *Local 1397* v. *United Steelworkers*, 748 F.2d 180, 184-85 (3rd Cir. 1984) ("the importance of uniformity of limitations periods" in labor law "was a major consideration in the *Del Costello* opinion itself" and favors retroactivity); *Landahl* v. *PPG Industries*, 746 F.2d 1312, 1315 (7th Cir. 1984) ("giving retroactive effect to the *Del Costello* rule would further its purpose"); *Lincoln* v. *District 9, International Association of Ma-*

chinists, 723 F.2d 627, 630 (8th Cir. 1983) ("retroactive application of *Del Costello* would further the policy of prompt settlement of labor disputes").

(c) Finally, contrary to petitioner's assertions (Pet. 10), application of the *Del Costello* rule in this case would not result in any substantial inequity to petitioner. Petitioner delayed bringing any action against the Union until December, 1977, which was more than two years after his discharge. He did not name the Company as a defendant or otherwise notify it of the lawsuit until April, 1979. The Company promptly asserted in its answer that the claim against it was barred by the applicable statute of limitations. Thereafter, by the time the Court's decision in *Mitchell* was announced in April, 1981 — which petitioner himself concedes clearly foreshadowed the *Del Costello* holding — petitioner had engaged in only limited discovery and had not requested or obtained any trial of the merits of his claim.

In light of these circumstances, this case is not like those cited in the petition, where courts of appeal refused to apply *Del Costello* retroactively on the grounds that the plaintiff, prior to the time *Del Costello* was announced, had "expended considerable time and effort in the development of [his] case on the merits." *Zemomick* v. *Consolidation Coal Co.*, 762 F.2d 381, 387-88 (4th Cir. 1985). See also *Byrne* v. *Buffalo Creek Co.*, 765 F.2d 364 (2d Cir. 1985) (refusing to apply *Del Costello* retroactively where parties had already invested a "large amount of time and money" in the lawsuit and a full trial on the merits had been held).

Nor is this case like *Edwards* v. *Teamsters Local No. 36*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984), also cited in the petition, which was subsequently followed in *Barina* v. *Gulf Trading & Transportation Co.*, 726 F.2d 560 (9th Cir. 1984). In *Edwards*, the Ninth Circuit held, without extended discussion, that *Del Costello* should not be retroactively applied in the case before it because the decision had overruled clear past

precedent that had previously existed in the Ninth Circuit. Similar reasoning cannot be followed in the present case because, as stated above, there was no clear precedent in the First Circuit as to what statute of limitations would be applied to an employee's suit against his or her *employer* under Section 301. Pps. 5-6 *supra*. Accordingly, even assuming it was correctly decided, the decision of the Ninth Circuit in *Edwards* does not offer any substantial support for petitioner's position in this case.[1]

For the foregoing reasons, the Court of Appeals was correct in holding, consistent with the decisions of numerous other courts of appeal, that the six month limitations period set forth in Section 10(b) of the NLRA is applicable in this action. *Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239 (2d Cir.), *cert. denied*, 105 S. Ct. 512 (1984); *Perez* v. *Dana Corp.*, 718 F.2d 581 (3rd Cir. 1983); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, 105 S. Ct. 292 (1984); *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984) (*en banc*); *Storck* v. *Teamsters*, 712 F.2d 1194 (7th Cir. 1983); *Lincoln* v. *District 9, International Association of Machinists*, 723 F.2d 627 (8th Cir. 1983); *Barnett* v. *United Air Lines, Inc.*, 738 F.2d 358 (10th Cir.), *cert. denied*, 105 S. Ct. 594 (1984); *Rogers* v. *Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), *cert. denied*, 105 S. Ct. 292 (1984).

2. Although the petition purports to raise four other questions in addition to the retroactivity issue, petitioner does not discuss any of these additional questions or say why certiorari should be granted with respect to them. In fact, each of the additional questions have to do with when petitioner's cause of action originally accrued, which is a factual guestion governed by the "clearly

[1] Petitioner also cites the decision of the Sixth Circuit in *Pitts* v. *Frito-Lay, Inc.*, 700 F.2d 330 (6th Cir. 1983), but *Pitts* does not support petitioner's position in this case because the Sixth Circuit subsequently held *en banc* that *Del Costello* must be applied retroactively. *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984) (*en banc*).

erroneous'' rule set forth in Rule 52(a), Fed. R. Civ. P. Petitioner does not appear to suggest that this happened at any time after December, 1977, when he in fact brought suit against the Union. Since petitioner did not add the Company as a defendant in the action until April, 1979 — or more than 15 months after he brought suit against the Union — the Court of Appeals properly held that petitioner's claim against the Company was barred by the six month statute of limitations.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 85-416.

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Brief of Respondent, Communications Workers of America, Local 1395 in Opposition.

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Questions Presented.

I. Should *DelCostello*, decided by this Court in 1983, establishing a six-month statute of limitations for actions by individuals against their unions and companies, be applied retroactively to bar a suit brought in 1977, when the appropriate statute of limitations was six years against companies and three years against unions?

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Opinions Below.

The opinion of the Court of Appeals is reported in *Scaglione* v. *Communications Workers of America, Local 1395,* 759 F.2d 201 (1st Cir. 1985). Otherwise, the statement of Petitioner identifying the opinions below is accurate.

Statutes and Rule Involved.

Aside from the statutes listed and reproduced in the Petition, Sup. Ct. R. 21.5 may be involved in the disposition of this Petition. The Rule provides as follows:

> The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

Statement of the Case.

In addition to the Statement of the Case contained in the briefs of Respondent AT & T Technologies, Inc. ("the Company") and Petitioner ("Scaglione"), Respondent Communications Workers of America, Local 1395 ("the Union") adds the following:

Although the Complaint in this matter was filed on December 29, 1977, it was not served on the Union until April, 1979.

Reasons for Denying the Writ.

The only issue briefed by Petitioner is whether the Court of Appeals was correct in its retroactive application of this Court's decision in *DelCostello* v. *Teamsters*, 462 U.S. 151 (1983), establishing a six-month statute of limitations for hybrid actions alleging a breach of contract by an Employer and a breach of the duty of fair representation by a Union. The issue of *Del-*

Costello's retroactivity is not one of general importance warranting this Court's consideration. Additionally, the decision below is consistent with Supreme Court precedent and the weight of authority of the Courts of Appeals. This instant petition does not raise any special or compelling issue requiring Supreme Court review.

A. *The Petition does Not Present Issues of General Importance Warranting This Court's Consideration.*

Petitioner himself unwittingly provides perhaps the strongest reason for not granting certiorari when he argues: "There are few of [*sic*] any suits in the country filed in 1977 alleging breach of the duty of fair representation which remains [*sic*] on the dockets." [Petition at 9.] In *Rice* v. *Sioux Memorial Park Cemetery, Inc.*, 349 U.S. 70, 77 (1955) Justice Frankfurter counselled against granting discretionary review in just this sort of situation: "[W]e should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute."

The issue of the retroactive application of this Court's ruling in *DelCostello* is on the verge of becoming outmoded. With the passage of time, the number of pending cases brought prior to this Court's decision in *DelCostello* inexorably declines. Accordingly, the retroactivity question assumes ever decreasing significance as fewer and fewer cases remain on the dockets which present the issue. *Cf. Zemonick* v. *Consolidation Coal Company*, 762 F.2d 381, 389 (4th Cir. 1985) ("This problem will shortly go away, if it is not already gone.")

Manifestly, Petitioner's case is not one "involving principles the settlement of which is of importance to the public as distinguished from that of the parties." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). In these circumstances, since the retroactivity of *DelCostello* will

soon be of no practical consequence, certiorari should not be granted to resolve what is fast becoming merely an academic issue.

B. *The Holding Below is Consistent with Supreme Court Precedent and the Weight of Authority of the Courts of Appeals, and the Instant Petition Provides No Compelling Reason for Granting Review.*

Petitioner asserts that this Court's 1983 ruling in *DelCostello* should not be applied retroactively to cases in which the cause of action accrued before April 20, 1981, when the Supreme Court issued its decision in *United Parcel Service* v. *Mitchell*, 451 U.S. 56 (1981). It is, however, a basic principle of our jurisprudence that a court is to apply the law in effect at the time it renders its decision. *Thorpe* v. *Housing Authority of City of Durham*, 393 U.S. 268, 281 (1969). Accordingly, "retroactive application of judicial decisions is the rule, not the exception." *Simpson* v. *Director, Office of Workers' Compensation Programs*, 681 F.2d 81, 84 (1st Cir. 1982) *cert. denied*, 459 U.S. 1127 (1983).

Undoubtedly the greatest obstacle to petitioner's overcoming the strong presumption in favor of retroactivity is this Court's decision in *DelCostello* itself; for in that case the Court not only announced a new statute of limitations, but it also applied the time bar to extinguish the very claims before it.[1]

Since this Court in fact applied its *DelCostello* ruling retroactively, it is not surprising that the vast majority of Courts of Appeals which have confronted the issue have followed the

[1] The claims of the *DelCostello* plaintiffs arose in 1977 and 1978 and suits were instituted within seven and ten months respectively. *DelCostello*, 451 U.S. at 155-157, 172. Scaglione's case history is virtually indistinguishable: his cause of action arose no later than mid-May, 1977 and he did not file his complaint until December 29, 1977, over seven months later.

Supreme Court's lead and have imposed the six-month statute of limitations on litigants who commenced their cases prior to the *DelCostello* decision. *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984); *Graves* v. *Smith's Transfer*, 736 F.2d 819 (1st Cir. 1984); *Barnett* v. *United Air Lines, Inc.*, 738 F.2d 358 (10th Cir.) *cert. denied*, 105 S.Ct. 594 (1984); *Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239 (2d Cir.) *cert. denied*, 105 S.Ct. 512 (1984); *Lincoln* v. *District 9, International Association of Machinists*, 723 F.2d 627 (8th Cir. 1983); *Rogers* v. *Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), *cert. denied*, 105 S.Ct. 292 (1984); *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Perez* v. *Dana Corp.*, 718 F.2d 581 (3d Cir. 1983); *Storck* v. *Teamsters*, 712 F.2d 1194 (7th Cir. 1983). Even those Circuits, the Ninth and the Fourth, which have not accepted retroactivity wholesale, have carved out potentially rule-swallowing exceptions to prospective-only application of *DelCostello*. *Glover* v. *United Grocers, Inc.*, 746 F.2d 1380 (9th Cir. 1984); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, 105 S.Ct. 292 (1984). No lower court, to the best of Union Respondent's knowledge, has endorsed Petitioner's suggestion that *DelCostello* should be applied retroactively to those claims which arose after April 20, 1981, but not to cases where the cause of action accrued before that date.

Finally, this Court has consistently rebuffed all requests for discretionary review of the retroactivity question, irrespective of whether the lower courts have adopted or rejected retroactive application. *Barnett*, *supra*; *Welyczko*, *supra*; *Rogers*, *supra*; *Murray*, *supra*; *Ernst* v. *Indiana Bell Telephone Company, Inc.*, 717 F.2d 1036 (7th Cir. 1983) *cert. denied*, 104 S.Ct. 707 (1984); *Edwards* v. *Teamsters Local No. 36*, 719 F.2d 1036 (9th Cir. 1983) *cert. denied*, 104 S.Ct. 1599 (1984).

Despite Petitioner's protestations, his grounds for opposing *DelCostello's* retroactivity are not unique, nor does his case

present facts which compellingly distinguish it from the array of cases cited above. The main thrust of Petitioner's argument appears to be that he diligently pursued his complaint against the Union, and it would be inequitable to apply *DelCostello* to him because when he filed suit in 1977 there was no way to predict that a six-month limitation period would govern duty of fair representation actions.

Although Petitioner asserts that he relied on clear past precedent in waiting for over six months after his cause of action accrued to sue the Union, he can, of course, point to no Supreme Court ruling (which is the starting point of analysis under *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 [1971]) on which he depended while delaying institution of his action. Indeed, in *International Union, United Auto Workers, Aerospace and Agricultural Implement Workers of America* v. *Hoosier Corp.*, 383 U.S. 696, 705 n.7 (1966) this Court specifically reserved on the question of the appropriate statute of limitations to be applied in cases of the instant sort.

Before *DelCostello* the lower courts were far from uniform as to the appropriate statute of limitations to be applied in hybrid breach of contract/breach of duty actions. Instead, the pre-*DelCostello* statute of limitations decisions were marked by uncertainty and conflict, as has been pointed out by several Courts of Appeals. *See, e.g. Lawson* v. *Truck Drivers*, 678 F.2d 250, 254 (6th Cir. 1983); *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857-862 (5th Cir. 1983); *Perez* v. *Dana Corp.*, 718 F.2d 581, 586 (3d Cir. 1983). In this confused context, any reliance plaintiff placed on appellate court decisions was clearly at his own risk, and does not entitle him to an exemption from the retroactive application of *DelCostello*.

Moreover, despite the fact that, pre-*DelCostello*, the Courts of Appeals were in conflict, the seeds of that decision were sown long before Petitioner's cause of action accrued. Even the concededly-foreshadowing case of *United Parcel Service* v.

Mitchell, 451 U.S. 56 (1981) did not represent a clean break with past precedent, but had its own genesis at least as early as 1976 in this Court's decision in *Hines* v. *Anchor Motor Freight,* 424 U.S. 554 (1976). *See Mitchell,* 451 U.S. at 61-62. In these circumstances, it can hardly be concluded that *DelCostello* represented the "abrupt and fundamental shift in doctrine" which is the prerequisite for prospective — only application. *Hanover Shoe* v. *United Machinery,* 392 U.S. 481, 498 (1968).

Thus, the premise of Petitioner's argument that he was justifiably taken by surprise by *Mitchell* and *DelCostello* is faulty on at least two counts: first, the lower court decisions in the statute of limitations area were in disarray, and, secondly, the Supreme Court had begun to lay the foundation for *DelCostello* at least a year prior to the accrual of Petitioner's cause of action. *Hines* v. *Anchor Motor Freight, supra.*

Finally, Scaglione's putative diligence in pursuing his claim does not withstand scrutiny. Although Scaglione filed suit in 1977, he inexplicably failed to serve the complaint on either defendant until April of 1979. Thus, his case languished for over fifteen months in the office of the Clerk of Court without any action being taken by Scaglione to pursue his claim. As a practical matter, the case "began" only in 1979 when the defendants were first given notice of Scaglione's claim. Had Scaglione in fact moved his case along with reasonable dispatch after filing the complaint, he may have avoided the statute of limitations problem he now faces. At any rate, given the inertia which characterized Scaglione's early pursuit of his claim, this is not the appropriate case in which to consider any limitation on the retroactivity of *DelCostello.*

C. *Miscellaneous Issues.*

In his statement of "Questions Presented," Petitioner lists for consideration four issues other than *DelCostello's* retroac-

tivity. Aside from the preliminary designation of these issues, however, nothing is mentioned in the Petition regarding these matters. In these circumstances, there would appear to be no basis for granting certiorari with respect to these undiscussed questions. *Cf.* Sup. Ct. R. 21.5. Accordingly, Respondent Union does not address these issues on the merits.

Conclusion.

The Petition for Certiorari should be denied.

Respectfully submitted,

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